

**Additional Comments in Amplification of Public Comment of Brian O'Connell of the
National Association of Regulatory Utility Commissioners February 2, 2011**

1. The New Nuclear Waste Management organization is new in all scenarios.

At least one panelist in the February 1 meeting, and possibly some commissioners, seemed not to realize there is no DOE entity managing the nuclear waste program today. The Office of Civilian Radioactive Waste Management, although established in statute (NWRPA Sec. 304) was eliminated by the Secretary of Energy at the end of FY 2010. Some residual functions have reportedly been transferred to other offices within DOE. The FY 2011 DOE budget request indicated the Office of Nuclear Energy would be engaged in "oversight of NWRPA requirements." Before OCRWM was disestablished, the Office shut down the Yucca site and turned custody over to the Nevada Test Site (which has a new name, that I do not know.) The contracting officer for the Standard Contracts has been transferred to the Office of General Counsel. There presumably is someone retained that manages the investment portfolio which comprise the corpus of the Nuclear Waste Fund, but we have no information on that. Indeed, although the utilities were forecast to collectively pay \$770 million in fees in FY 2010 and the Fund would also earn over \$1 billion in "investment returns" in the same period the most recent Summary of Program Financial & Budget Information, formerly published monthly on the OCRWM website is dated January 31, 2010.

The point is that, to our knowledge, there is no ongoing nuclear waste program management within DOE. The civil service personnel have either been reassigned or left federal service. The various support contracts have been closed out and workers let go. Even if the waste program is retained in DOE (within the Office of Nuclear Energy or elsewhere) it will be a new organization or at least new people even if OCRWM is resurrected. Much experience has been lost and no one should be surprised if there is not a lag in re-starting the civilian radioactive waste management program for whatever redirection it may be called upon to implement.

2. "100 years is not 'interim' in most people's mind."

This was the point I wanted to raise in my public comment and one of the commissioners stated it well. NARUC was concerned with recent documents that to us seem to gloss over the perspective that we have on behalf of ratepayers and communities near present storage sites:

- a. The Nuclear Regulatory Commission released its Waste Confidence Decision in December 2010. It is lawyerly and nuanced, but the headline is that the NRC has confidence that spent fuel can be safely stored for at least sixty years beyond the licensed life of any reactor.

- b. The MIT Fuel Cycle Study was summarized to the BRC in September by Commissioner Moniz and members of the study team. Included was the recommendation for extended storage “for about a century” for used fuel, pending later decisions of whether to dispose in a repository or recycled if advances in technology and economics become favorable—and disposing of a different waste form in a repository.

These two developments were not presented to the nuclear utilities or their neighboring communities, that we know of, because as of yet no one in government is proposing action and, of course, the utilities have in hand the standard contracts that say that, “DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel... *as expeditiously as practical* upon request of the producer or owner of such... spent fuel.” (Emphasis added.)

The suggestion that such longer term storage is possible may be valid in terms of engineering and safety considerations, but it does not give a balanced picture if there is not a recognition that the government and the taxpayers face an ongoing liability for the partial breach in those contracts, which would grow beyond the most recent estimate of \$16.2 billion.

3. Can the Nuclear Waste Fund be used for central interim storage?

It likely would require legislation.

Section 302 (d) of the NWPA lists uses authorized for Fund. Central interim storage is not listed among the uses. Sec. 131 states “The persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel.” There was also a provision in the same section for the Government to provide interim storage for up to 1,900 metric tons for those owners whose sites lacked the additional storage capacity. In Sec. 136 the Secretary of Energy was authorized to enter into contracts by January 1990 with owners who sought that storage service. Owners would be required to make payments to an Interim Storage Fund set up by DOE at rates to fully recover the storage costs.

Since that Interim Storage program was not set up by the 1990 date, DOE has stated their legal opinion that the authority for interim storage has lapsed.

Sec. 141 established a Monitored Retrievable Storage (MRS) program with many detailed provisions and restrictions that include this one: “construction of such a facility may not begin until the (NRC) has issued a license for the construction of a repository.”

4. Can the Nuclear Waste Fund be used for DOE (or a new entity) to take title and continue on-site storage?

Not without legislation. The panelist from the Department of Justice said the 11th Circuit Court of Appeals established that in *Alabama Power v. DOE* in 2002.

The Spent Nuclear Fuel On-Site Storage Security Act of 2005 (S.2099) proposed by the two Nevada senators would have authorized DOE to take title to the spent fuel once it is removed from the cooling pools and use the Nuclear Waste Fund to pay for the costs. The obligation seemed open-ended. Senator Reid said such redirection of funds away from the Yucca Mountain project would store the waste safely “while we look for a safe, scientifically sound solution to the spent nuclear fuel storage issue.” The press release from his office said, (the) “Bill will eliminate need for central nuclear waste repository like proposed Yucca Mountain project.”

Mr. Hertz from the Justice Department during a panel discussion before the BRC on February 2, said he had not studied the question, but he did raise the question of DOE needing to purchase the land where the dry cask storage would be, which could be complicated. Also a practical problem and possibly wasteful is the prospect of separate armed security forces protecting different parts of a high security installation. Rather than establish new DOE field organizations at the 72 sites where spent fuel is stored (growing a new civil service workforce when the rest of the government is being reduced seems unlikely) it seems to make sense that DOE would contract for storage management and security forces with the utility which now does those functions in an integrated manner with the power plant operation. Rather than collect fees from a utility, send them to Washington and then them be used to pay the utility to store what used to be the owner’s spent fuel but then becomes the government’s property, it would seem less cumbersome to not collect the fees and for the owner continue to be responsible for the used fuel until the government (or new successor entity) is ready to accept title and remove it. There would need to be some resolution of the damage claims from past delay-caused storage costs.

The discussion suggested that it might be possible for the utilities and DOE to negotiate a change to the standard contracts that could lead to DOE taking title and managing used fuel at reactor sites. That seems difficult to envision for the reasons previously discussed and others that might be termed unknown unknowns. But the question is not just a matter to be decided among two parties to the contracts. There are however other affected parties. The public in the surrounding region where the materials will remain stored longer. There should be some form of advisory board to represent the public interest and possible State government agencies. If the decision to have the government take title is to limit the liability that may lead to loss of motivation to remove the fuel since, as one panelist argued, “they have already paid for” the storage facilities.

5. “The \$24 billion corpus of the Nuclear Waste Fund is irrelevant.”

That was a pronouncement of one of the panelists who was a veteran of federal fiscal realities and with the status quo circumstances. It could be one of those “depressing” conditions that several commissioners acknowledged. It seems to me that tackling the “daunting challenge” that Co-Chairman Hamilton outlined in the first meeting of the BRC includes putting a spotlight on the financial weaknesses of the present dysfunctional management of the Nuclear Waste

Fund. Notwithstanding the bewildering Congressional and federal fiscal rules, the premise of the NWPA establishing the Nuclear Waste Fund was that fees would be placed on nuclear power generation such that they would be sufficient to have full cost recovery for (the decades of expenditures) disposal of used nuclear fuel in one or more repositories. Each published Fee Adequacy Assessment that has been published assumes that the corpus and the annual “investment returns” added to it (now exceeding the total annual fee revenue!) are real and will be available when the repository program needs it. If that balance (which is more like \$26 billion if you can get the latest amount confirmed by DOE) is “gone” then the fee would need to spiral upward.

Part of the reason for interest in having the fees be set, collected, and managed by being either off-budget or outside government altogether is that with proper controls and oversight there would not be “disappearance” of financial assets that are paid into the fund, as many believe is presently the case with the Nuclear Waste Fund. Others say, “No, that money that was borrowed from the Fund, will be returned when the program needs it. It is backed by the full faith and credit of the United States.” Only time will tell who is right.

On behalf of the millions of ratepayers who bear the burden of the Nuclear Waste Fund fees since 1983—even as the date that waste disposal was to have begun in 1998 came and went—and continue to do so today, they should not have to be further disillusioned into believing the payments that had no choice but to accept may have gone for naught.

6. Can the standard contracts between DOE and the nuclear utilities be renegotiated to match annual NWF fee payments so that the utilities collectively match appropriated fund that year?

This was an interesting question that seems to accept the “corpus is irrelevant” theory and seeks to stop the loss of the surplus between total fee revenue and annual appropriations. Mr. Hezir suggested there might be a way to have the utilities set aside the surplus and have it held for future payment similar to the decommissioning trust fund each nuclear reactor owner has.

Several State legislatures and public utility commissions have had discussions of possibly escrowing the fees but no actions have been taken.

7. A commissioner expressed an interest in knowing:

- a. Cost of on-site storage**
- b. Cost of central interim storage**
- c. Cost of disposal**

The Government Accountability Office (GAO) prepared a report (GAO-10-48) *Nuclear Waste Management Key Attributes, Challenges and Costs for the Yucca Mountain Repository and Two Potential Alternatives* in November 2009. The report stressed that the three alternatives are not comparable. For example, the cost of the two storage alternatives do not include the cost of a future repository. The report took input on utility on-site storage costs, but there is no data for costs if DOE were to manage the used fuel at present storage sites. DOE has said that the added cost of storage of government high-level waste is \$500 million per year. There are no central

interim storage facilities, but several model calculations for 100 years of storage ranged from \$23 billion to \$81 billion.

8. “Why can’t we just do it?” Meaning move some waste to a government site.

Mr. Kevin Cook suggested the Commission recommend some “baby steps” that could help regain public (and congressional) trust for DOE, such as the request the House Appropriations Committee in 2007 for DOE to develop a plan to provide central interim storage for 2,800 metric tons of used fuel now at nine single unit reactor sites that have been decommissioned except for the remaining fuel storage. [NARUC urged the Commission to quickly endorse implementing such a plan during the August 10, 2010 meeting of the Transportation and Storage Subcommittee meeting in Wiscasset.]

What stands in the way of developing a central interim storage facility is the lack of a site, as well as a sense of requirement for DOE to find one. That was because the agency interprets the NWPA that it does not have authority to provide interim storage (in their December 2008 report, DOE/RW-0596, DOE termed such an endeavor as likely to be controversial and would be a distraction from concentrating on building Yucca Mountain that they said would be likely to be ready for permanent disposal at nearly the same time as the temporary facilities.)

One commissioner asked why some spent fuel can’t be moved to a federal site that already had nuclear materials, such as a National Laboratory or a military installation or even a former base closed under the BRAC process.

First, there are five DOE sites with high-level radioactive waste that requires geologic disposal and had been planned that it would go to Yucca Mountain. The Commission visited three of those sites and heard the attitudes there from the communities about the need for waste to be removed rather than have more shipped in.

Just because the federal government owns a potentially suitable site for temporary storage does not mean it that much easier than a non-federal site. First, there needs to be the same kind of siting requirements and criteria as any site. It has to not interfere with existing missions of the installation. Because the facility development would be a “significant federal action,” it would require compliance with NEPA, just as it would for any site. Even if a successor entity were private there would be a requirement to get a 10 CFR Part 72 license from the NRC and the NRC would need to comply with NEPA.

Siting a storage facility at a closed or closing military base is a theoretical possibility as the surrounding community is eager to try to overcome the economic loss of the closing base. Base Closure and Realignment Commissions have reduced military bases with the most recent round in 2005. Base closure reuse planning begins almost immediately and economic development faces challenges and many successes. The Office of Economic Adjustment within the Department of Defense guides and assists the base reutilization process and would be a helpful resource in such a site search.

Further causing any “just do it” spirit to be moderated is the expectations that careful planning of transportation, as under WIPP and as planned under NWPA, will take time and resources. This is the way to increase public confidence in nuclear waste transportation.